(3)

No. 89-1698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.,

Petitioners,

v.

WILFRED KEYES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

MICHAEL H. JACKSON
SEMPLE & JACKSON
The Chancery Building
1120 South Lincoln Street
Suite 1300
Denver, Colorado 80203
(303) 595-0941

PHIL C. NEAL
Counsel of Record
NEAL GERBER & EISENBERG
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

Attorneys for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-1698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.,

Petitioners,

v.

WILFRED KEYES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

ARGUMENT

1. Respondents attempt to distinguish this case from *Spangler* and *Morgan* by arguing that the desegregation plan ordered by the 1974 decree, as modified by the court of appeals in 1976, was never intended to be a "complete" plan but rather was a plan to be "accomplished by a

series of interim amendments."[1] The court of appeals accepted the same argument, in a footnote citing the opinion of Kennedy, J. in the Ninth Circuit decision ordering dismissal of the *Spangler* case.[2] App. A15 n.2. The cited passage emphasized that this Court's decision in *Spangler*[3] was premised on the fact that the plan involved was not a step-at-a-time remedy. *See* 611 F.2d at 1243.

The suggestion that the Denver plan was ever intended as a step-at-a-time plan is simply wrong. The district court expressly acknowledged that this was not a case involving a step-at-a-time plan. App. B55. Examination of the district court's decision ordering adoption of the Finger Plan in 1974 will demonstrate that the plan was as comprehensive and complete a desegregation plan as any ever entered, and that the district court regarded it as a "final"—i.e., complete—plan. *See Keyes v. School Dist. No. 1*, 380 F. Supp. 673, 674, 688-726. The fact that the decree retained jurisdiction for possible modification does not distinguish this case from *Morgan*[4] or *Spangler* or, probably, from any other desegregation decree ever entered.

Jurisdiction was properly retained at the outset if for no other reason than that it might have proved necessary to modify the student attendance plan if it had not "worked." But it did work, and did so in the year of implementation. The district court expressly found that during the 1976-77

---

[1] Respondents evidently concede, as they must, that unless their characterization of the Denver plan as an "incremental plan" is correct, the decision below is in conflict with the *Spangler* and *Morgan* decisions. *See* Br. Opp. at 23-24.

[2] *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1243 (9th Cir. 1979).

[3] *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

[4] *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).

school year "the Denver school district can be considered desegregated with respect to pupil assignments." App. B35. The court then said, "That, of course, is but one of the elements of a unitary system," and proceeded to find deficiencies with respect to faculty assignments and monitoring of transfers. As the court of appeals correctly held, however, consistent with the *Spangler*, *Morgan* and *Overton*[5] cases, any deficiencies in other aspects of a unitary system should not have prevented finding unitariness as to the student attendance pattern. App. A14.

But the court of appeals was itself in error in treating the *Spangler* case as distinguishable on the ground that the Denver plan was a step-at-a-time desegregation plan. "Interim" or step-at-a-time plans had long been held constitutionally infirm by this Court at the time the decree in this case was entered,[6] and both the district court and court of appeals in 1974 and 1976 manifested a sensitive regard for the holdings of this Court that a remedial plan must be one that promises to "work now" and that seeks "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *See Keyes*, 380 F. Supp. at 684, 685; *Keyes v. School Dist. No. 1*, 521 F.2d 465, 477-78, 480 (10th Cir. 1975). The Finger Plan was intended to be, and was, just such a plan.

2. Respondents' statement (Br. Opp. at 16-17) that "it was known at the time that the integration would be undone by changes already contemplated by the Board" is not supported by the references respondents cite. As to

---

[5] *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987).

[6] *Green v. Sch. Bd. of New Kent County*, 391 U.S. 430 (1968); *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

the fact that the school board had requested that no changes in the student assignment plan be made for three years (App. B18), the resolution cannot be treated as a concession that the principle of the *Spangler* case would not apply to Denver. For one thing, it could not have been foreseen that the Finger Plan would, in fact, have "worked" as completely as it did and that modifications would not be needed to achieve a racially neutral attendance pattern. More important, *Spangler* had not even been decided at the time the board resolution in question was adopted. And in any event, as this Court held in *Spangler*, the failure of a school board's predecessors to appeal orders that might have been challenged cannot bar a present challenge to injunctive orders that are beyond the proper remedial bounds of a federal court's authority. *See* 427 U.S. 424, 437.

The principles enunciated by this Court in *Spangler* are as applicable to the Denver school district as to Pasadena, Boston, or any other district.

3. Respondents' intimations that the Board ever "disobeyed" any part of the original decree relating to the student assignment plan or any subsequent order modifying that plan are without support in the record or in any statement of either the district court or the court of appeals. There has never been any contention, let alone any finding, that the Board has not carried out to the letter the student assignment plan ordered in 1974 as modified in 1976, and every subsequent order of the court modifying details of the plan.

The faculty assignment and hardship transfer issues cited by respondents as "disobedience" are false issues. These matters were not even before the court of appeals (because they had been mooted by the Board's changes of policy), they are not mentioned by the court of appeals, and

there are no "concurrent findings of both courts below" as to them. *Cf.* Br. Opp. at 16. But the suggestion that there was "disobedience" is not supported even by the district court's opinion. The district court itself specifically rejected plaintiffs' request for a finding that the Board had fostered any misuse of the transfer policy (or that there was any misuse) and found only a lack of "adequate concern" and "monitoring" to prevent the "possibility" of misuse. App. B47. As to faculty assignments, the district court found that both the plaintiffs and the defendants had misinterpreted the formula intended by the original decree, and also that the decree itself was deficient in not prescribing a maximum as well as a minimum. App. B38. Thus neither court below has found or held that the Board "disobeyed" any injunctive provision.

4. The only basis for respondents' assertion that the Board "resegregated schools which were previously integrated" is that the Board implemented changes in the student assignment plan that were approved by the district court after lengthy proceedings in 1982. The "resegregation" that occurred was that three schools fell short of the Anglo percentages that had been projected and thus, although previously within ethnic proportions originally contemplated by the decree (App. D8 n.1), were below the guideline Anglo percentage in the years immediately after 1982. There was no intentional "resegregation" and the district court found none. Indeed, the district court appears to have regarded as irrelevant what the "cause" of the "resegregation" was. ("It is . . . no answer that any resegregation was not the *fault* of the School Board." App. B54 (emphasis in original).)

The district court relied on the fact that it had given only "temporary" approval to the 1982 changes. Its rationale is a formula for indefinite judicial control over a

school district's student assignment plan, continuing long after a "racially neutral attendance pattern" has been established. On that rationale, all a court need do to perpetuate its authority to require continuing readjustments to maintain racial balance is to give "conditional" approval to some change requiring court approval (such as the closing of schools due to declining enrollments, as was the case here). If racial imbalance in some schools results thereafter (as it inevitably will in a large urban district with constantly shifting population) the court can then say "resegregation has occurred as a result of board action" and then require still further "conditional" adjustments to improve racial balance. And so on, *ad infinitum*.

Such a theory nullifies the principle of this Court's *Spangler* decision.

5. Respondents assert that the district court's replacement of the previous decree with the Interim Decree was not "premised on the unitary status of the District." Br. Opp. at 24. It is no doubt true that the district court did not declare the school district unitary, or intend to do so. (As noted above, the district court had already held that unitariness could not be found as to student assignments alone, a position the court of appeals has now held was erroneous. *See* App. A14.) Whether the district court "premised" its action on "unitary status" is beside the point, however. What the court *did* was determine that the student attendance plan mandated by the remedial decree need no longer be followed, and it substituted no other plan. That action cannot mean anything less than that in the view of the court the Finger Plan had served its purposes.

6. Respondents' arguments that the Interim Decree does not require continuing adjustments to preserve racial balance are manifestly contrary not only to the words of

the decree but to the entire tenor of the opinions of the district court leading up to the Interim Decree, which carry the unmistakable message that that court is not prepared to relinquish jurisdiction over the Denver school district until the Board has demonstrated to the court's satisfaction that it will permanently maintain some undefined level of racial balance in all the Denver schools.

The suggestion that the court of appeals' "gloss" on Paragraph 2 (*see* Br. Opp. at 27) has eliminated such a requirement is patently erroneous. *See* Petition at 17-18. The further suggestion that adjustments to maintain racial balance are not required unless imbalance is the result of "Board actions" is equivalent to saying that a person cannot be liable for negligence if he stands motionless. A school board cannot freeze indefinitely—unless it abdicates its responsibilities for education—all aspects of a school system that affect the student attendance pattern. Unless the Interim Decree commands *in*action, which it does not purport to do, it necessarily commands that the Board act continuously to preserve racial balance in all the schools of the district.

7. Respondents' efforts to justify the amorphous commands of the Interim Decree only underscore the fundamental objections to a decree of the kind entered in this case. If the "combination of factors and considerations that go into consideration of issues relating to pupil assignment, school construction and utilization, to name just a few topics of everyday school district life, are too complex to be captured and prejudged by any rigid formula," (Br. Opp. at 36) they are not suitable "factors and considerations" to be governed by the intrusive exercise of the injunctive powers of a federal court. The district court's effort to make the school district find its own way, at the risk of contempt and of ever-receding release from judicial

supervision, bears more resemblance to the actions of a probation officer than to the proper remedial use of a federal court's authority over elected officials of local government.

CONCLUSION

For the reasons set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL H. JACKSON
SEMPLE & JACKSON
The Chancery Building
1120 South Lincoln Street
Suite 1300
Denver, Colorado 80203
(303) 595-0941

PHIL C. NEAL
Counsel of Record
NEAL GERBER & EISENBERG
208 South LaSalle Street
Suite 900
Chicago, Illinois 60604
(312) 269-8000

Attorneys for Petitioners